Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

SUMMER TERM, 1978

NO. 77-1595

STATE OF WASHINGTON,

Respondent,

vs.

WILLIAM E. COSDEN, JR.,

Petitioner.

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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I. STATEMENT OF THE CASE.

Respondent adopts the recitation of facts set forth by Judge Pearson in the written decision of the Washington State Court of Appeals Division II, entered July 20, 1977, State vs. Cosden, 18 Wn. App. 213, and set forth in Appendix A of Petitioner's Brief.

Relative to the first question raised by Petitioner special attention is suggested to the testimony and evidence supporting the victim's version of events recited by the Washington Court of Appeals (Petitioner's Brief, Page A-4).

Relative to the second question raised by Petitioner, special attention is suggested to the Washington Court of Appeals' description of

the statements of Petitioner to police as a volunteered defense inconsistent with the defense interposed at trial (Petitioner's Brief, Page A-10).

II. ARGUMENT AND RESPONSE TO PETITION.

A. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

1. Petitioner has invoked the jurisdiction of this court pursuant to 28 U.S.C., Section 1257 (3) by claiming that RCW 9.79.150 is repugnant to the United States Constitution. It is respectfully submitted that this claim is mooted by the interpretation given the statute by the Washington State Court of Appeals. As Judge Pearson clearly explained, Petitioner's requested evidence was admissible under the statute provided he could satisfy the trial court that the probative value was not substantially outweighed by the danger of undue prejudice. (Petitioner's Brief, Page A-7 and 8) The fact that Petitioner was unable to lay a sufficient foundation for admissibility does not mean that future defendants in similar cases will not be able to do so. The Washington statute as interpreted by the Washington Courts does not deny the right to present relevant evidence in defense to a rape charge. Nor does it deny a defendant the right of confrontation of a witness against him. No authority has been offered for the proposition implicit in Petitioner's argument, namely that a state statute cannot constitutionally vest descretion in a trial court to weigh the probative value versus the prejudicial effect of proposed testimony.

2. The case of Doyle vs. Ohio, 426 U.S. 610, 49 L. Ed. 2d 91, 96 Sup. Ct. 2240, 1976, was decided after the trial of this case, and the applicability of its holding first considered on the appeal of this case. It is submitted that the Washington Appellate Court sufficiently distinguished the facts of this case from the facts in Doyle, so that there exists no conflict between current Washington law as established by this case and the Federal Constitution. This case presents no new substantial Federal question. Federal Appellate courts have been found to be in accord with the Washington Appellate Court's interpretation of Doyle. Twyman vs. Oklahoma, 560 Fed.2d 422, Tenth Circuit, 1977, held it permissible to cross-examine a defendant about the discrepancy between his post-arrest statements and his trial testimony. U.S. vs. Blalock, 564 Fed.2d 1180, Fifth Circuit, 1977, held that defense tactics may make it permissible to explore even a defendant's complete post-arrest silence by cross-examination. See also U.S. vs. Mitchell, 558 Fed.2d 1332, Eighth Circuit, 1977; U.S. vs. Creamer, 555 Fed.2d 612, Seventh Circuit, 1977; Hayton vs. Egeler, 555 Fed.2d 599, Sixth Circuit, 1977.

B. THE JUDGMENT IS SUPPORTED BY INDEPENDENT STATE GROUNDS.

The admissibility of evidence and the scope of cross-examination and argument have traditionally been areas in which trial judges exercise unique discretion. It has been the traditional rule of law in this country that Certiorari will not lie to review merely discretionary actions absent a showing of manifest, clear, great or gross abuse of discretion.

Regarding the first question presented in this case, the Washington State Appellate Courts specifically upheld the trial judge's exercise of discretion:

> "In short, the probative value of the evidence was weak and nonpersuasive in light of all the other facts and circumstances of this case, and the foundation evidence insufficient. Accordingly, we hold there was no abuse of discretion in refusing to allow the evidence. We note also that defendant was not precluded from contending that Dr. Wilson's opinion evidence corroborated his defense." State v. Cosden, supra (Petitioner's Brief, Page A-9).

Regarding the second question presented, the trial court's discretionary decision that the Prosecutor's cross-examination and argument was relevant and proper based on the evidence, was not even questioned by the Washington State Appellate Courts. No sufficient reason for disagreement has been offered to this Court.

Respectfully submitted,

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